

OGC Has Reviewed

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25 February 1947

MEMORANDUM TO CHIEF, FINANCE DIVISION

Subject: Payment of 25% Differential

1. Reference is made to your memorandum to this office, dated 17 February 1947, concerning the above subject. You question the legality of paying non-Americans a 25% differential in addition to a basic salary. You also state that the personnel concerned are located in the vicinity of

2. Your attention is invited to Departmental Circular No. 394, dated 3 December 1942, issued by the United States Civil Service Commission. Three Supplements have been issued to this Circular. The Circular refers to an Opinion of the Comptroller General, dated 23 November 1942, which was published as 22 Comp. Gen. 491. A summary of the Comptroller General's rulings is contained in the Circular. The main points are as follows:

(a) The heads of departments and independent establishments are required to adjust compensation of civilian positions in the field service to the grades and compensation schedules of the Classification Act of 1923, as Amended, provided such positions are not excepted by Statute from the Classification Act, where such positions are (1) in the territories and insular possessions of the United States, or (2) in foreign countries.

(b) It is permissible for the head of a department or independent establishment to fix administratively salary differentials upon a percentage basis for employees serving at any location outside of the States and the District of Columbia, if it is determined to be otherwise impracticable to recruit personnel for such positions provided the salary rate fixed for such employee does not exceed by more than 25% the salary rate authorized to be fixed for the same or similar position in the States and the District of Columbia.

(c) It is within administrative discretion to fix a salary differential at less than the maximum authorized.

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Chief, Finance Division

-2-

25 February 1947

3. The Supplements to the Circular indicate that a policy agreement was drawn and signed by a number of Government agencies. Generally, the agreement provides that a uniform salary differential of 25% will be adopted where employees are occupying positions subject to the Classification Act of 1923, as Amended. Certain special conditions of application are listed. For example, (a) in [REDACTED] the differential was to be applied to all employees regardless of where recruited; (b) in [REDACTED] the differential was to be applied only to personnel recruited from the States; and (c) in the Atlantic bases the differential was to be applied only to citizens of the United States. It is to be noted that this policy agreement is not binding on all Government agencies, but only the signatory agencies.

4. The entire question of payment of salary differential was discussed by this office with various members of the Civil Service Commission. It was pointed out by the Commission that, in the absence of specific statutes, the above-cited Decision of the Comptroller General, recognizing the administrative authority for fixing salary differential rates, is the basis upon which Government agencies presently are paying such differentials. It appears that the provisions of Title II of the Act of 26 November 1940, incorporated in the U. S. Code, Annotated, as Section 681 of Title 5, and Executive Order 8955, dated 1 December 1941, are no longer relied upon by the War and Navy Departments as the basis for salary differential since the Decision by the Comptroller General of 23 November 1942. The ruling in 23 Comp. Gen. 319, 1 November 1943, is pertinent, stating that:

"The long existing administrative practice, recognized as proper by the decisions of this office, of paying a differential in compensation not to exceed 25 percent to employees with posts of duty outside continental limits of the United States - - * * * - - is general in scope and applicable regardless of the law pursuant to which the basic compensation of the employees is paid."

5. In view of the above, it is the opinion of this office that the question of paying salary differential is within the complete administrative discretion of the Director, CIG, provided the differential rate does not exceed 25%. The fact that an employee was residing at the place of employment outside the United States at the time he was hired, would not appear to affect legally the payment or non-payment of the differential. In addition, the fact that the employee may not be a United States citizen would not affect legally such payment or non-payment.

Chief, Finance Division

-3-

25 February 1947

6. In discussions with the Civil Service Commission, this office was advised that a Tentative Draft of a report, dated April 1946, was prepared by the Civil Service Commission and the Bureau of the Budget entitled "Pay Differentials and Related Compensation Problems in the Federal Service Outside the States". This Draft has been circulated to various agencies for comment. A copy of the draft report is being sent to this office and will be referred to your office for consideration when received.

LAWRENCE R. HOUSTON
General Counsel

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cc: [REDACTED]
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